

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-12220-GAO

CARLOS RIVERA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ORDER
April 27, 2007

O'TOOLE, D.J.

The petitioner brings this habeas petition under 28 U.S.C. § 2255 challenging his criminal conviction on the basis of the trial court's application of the Armed Career Criminal ("ACC") sentencing enhancement. 18 U.S.C. § 924(e)(1) (2000). The petitioner was convicted by this court in 2003 for violating 18 U.S.C. § 922(g) and sentenced to 205 months of imprisonment.

On direct appeal, the petitioner challenged the application of the ACC guidelines, contending that the government did not offer any evidence of the predicate offenses and therefore failed to meet its burden of proving ACC predicates by a preponderance of the evidence. (Appellant's Br. 19-25.) Both the petitioner and the First Circuit noted that the petitioner failed to object to the application of the ACC provision at trial. The First Circuit affirmed the conviction, finding that the petitioner "waived any challenge to application of the Armed Career Criminal guidelines" and that the district court committed no plain error in sentencing. United States v. Rivera, No. 04-2295, slip op. at 1 (1st Cir. July 21, 2006).

On collateral attack, the petitioner again attacks the application of the ACC guidelines at his sentencing. In essence, the petitioner now argues that his prior state law convictions were not predicate offenses that could support the criminal charge of being a felon in possession by operation of 18 U.S.C. § 921(a)(20). (Pet'r Br. 6.) In support of this argument, the petitioner relies on United States v. Marin, 437 F. Supp. 2d 227 (D. Mass. 2006) and United States v. Indelicato, 97 F.3d 627 (1st Cir. 1996). The respondent, on the other hand, points out that the petitioner's state law convictions were for felonies, thereby falling outside the scope of Marin and Indelicato and requiring summary dismissal of the habeas petition.

Initially, it should be noted that "[i]ssues decided on direct appeal generally cannot be relitigated in a section 2255 motion." Robinson-Munoz v. United States, 819 F. Supp. 1136, 1142 (D. Puerto Rico 1993) (citing United States v. Michaud, 901 F.2d 5, 6 (1st Cir.1990) (per curiam); Tracey v. United States, 739 F.2d 679, 682 (1st Cir.1984)), aff'd Rojas v. United States, 81 F.3d 147 (1st Cir. 1996) (table). In this case, the First Circuit clearly decided on direct appeal that the petitioner waived any challenge to the application of the ACC guidelines, barring the petitioner from re-litigating this claim in the instant petition.

Even if this Court were to give a generous interpretation of the petitioner's collateral appeal by reading it as raising claims distinct from those addressed by the direct appeal, the petitioner faces the significant bar of procedural default, which precludes relief "when a prisoner did not raise claims at trial or on direct review."¹ Owens v. United States, -- F.3d -- 2007 WL 1083136, at *3 (1st Cir. 2007) (citing United States v. Frady, 456 U.S. 152, 168 (1982); Knight v. United States, 37 F.3d 769,

¹ A district court may sua sponte raise the issue of procedural default in a 2255 petition. Oakes v. United States, 400 F.3d 92, 97 (1st Cir. 2005).

774 (1st Cir.1994)). In such cases, a court may only hear those claims on a § 2255 motion if the petitioner has demonstrated either “cause and prejudice” or actual innocence. Id.; see also Bousley v. United States, 523 U.S. 614, 622 (1998). Adhering to this rule “has the salutary effect of preventing criminal defendants from using collateral review as a painless surrogate for direct appellate review.” Oakes v. United States, 400 F.3d 92, 97 (1st Cir. 2005).

In the instant case, the petitioner offers no explanation as to why he was unable to raise the current argument on direct appeal when he did raise other arguments attacking the application of the ACC to his case. In other words, the petitioner fails to show cause as to why he procedurally defaulted. Moreover, he also makes no attempt to demonstrate actual innocence. Thus, he cannot overcome the bar of procedural default.

Finally, the petitioner alludes to an ineffective assistance of counsel claim in his petition. The petition, however, is bereft of any legal arguments or factual assertions beyond the conclusory statements asserting that his attorney at trial was “grossly ineffective” by conceding that the ACC applied. (Petition 1, 12-14.) Beyond the fact that such allegations are insufficient to adequately present this claim, the court is not obliged to accept these few statements as true because ““they state conclusions instead of facts.”” United States v. McGill, 11 F.3d 223, 225-26 (1st Cir. 1993) (citing Shraiar v. United States, 736 F.2d 817, 818 (1st Cir.1984)). Moreover, the First Circuit has made clear that “when a § 2255 motion (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case,” the petition may be denied without a hearing. United States v. McGill, 11 F.3d 223, 225-26 (1st Cir. 1993) (citing Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir.1974)); see also David v. United States, 134 F.3d 470, 478 (1st Cir. 1998).

For the foregoing reasons, the habeas petition is DISMISSED.

It is SO ORDERED.

April 27, 2007
DATE

/s/ George A. O'Toole, Jr.
DISTRICT JUDGE